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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 CHRISTIAN FOUMAL,

9 Plaintiff,

10 v.

11 CCO McCARTNEY (RS COUNSELOR),

12 Defendant.

No. C11-5310 BHS/KLS

REPORT AND RECOMMENDATION
Noted for: September 30, 2011

13 On July 8, 2011, Plaintiff was granted leave to file an amended complaint on or before
14 December 26, 2010. ECF No. 9. Plaintiff has not responded to the Court's order. The
15 undersigned recommends that the action be dismissed.

16 **DISCUSSION**

17 In his complaint, Plaintiff claimed that Corrections Officer McCartney, a RS Counselor at
18 the Washington Corrections Center defamed Plaintiff's character, slandered him with statements
19 without provocation or factual basis, and subjected him to ridicule, when he responded to
20 Plaintiff's kite as follows:

21 You are in for CCCC

22
23 You sir – are a career criminal with no visible intention of good. – Without
24 conscience – Predicted by all demographics to do violence out of selfishness. HV
probability factor – man up.

25 ECF No. 8, pp. 3-4. Plaintiff seeks monetary damages for emotional duress. *Id.*, p. 8.
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1 On the basis of these allegations, the Court found that Plaintiff failed to state a viable
2 cause of action under 42 U.S.C. § 1983 because there is no civil rights action for slander. ECF
3 No. 9 (citing *Hollister v. Turtle*, 210 F.3d 1033, 1036 (9th Cir. 2000)). Defamation alone is not a
4 constitutional violation. *See Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 47 L.Ed.2d 405
5 (1976) (“[P]etitioners’ defamatory publications, however seriously they may have harmed
6 respondent’s reputation, did not deprive him of any ‘liberty’ or ‘property’ interests protected by
7 the Due Process Clause”). Damage to reputation, standing alone, cannot state a claim for relief
8 under section 1983 because reputation is neither a property nor liberty guaranteed against state
9 deprivation without due process of law. *Johnson v. Barker*, 788 F.2d 1396, 1399 (9th Cir. 1986).

11 In addition, any claim for intentional infliction of emotional distress based on the alleged
12 defamation stands or falls with the defamation claim. An independent cause of action for
13 intentional infliction of emotional distress based on the same acts that would not
14 support a defamation action will not be allowed. *See Flynn v. Higham*, 149 Cal.App.3d 667, 197
15 Cal.Rptr. 145 (1983) (allowing independent cause of action for intentional infliction of emotional
16 distress based on same act which would not support defamation action would render meaningless
17 any defense of truth or privilege).

19 Based on the foregoing, Plaintiff was advised that he had failed to assert denial of a right
20 secured by the Constitution or laws of the United States. Nevertheless, he was given an
21 opportunity to show cause and/or file an amended complaint to cure, if possible, the deficiencies
22 of his complaint. Plaintiff was given until August 5, 2011 to do so and was warned that if he
23 failed to do so or failed to adequately address the issues raised in the Order to Show Cause, the
24 Court would recommend dismissal of this action as frivolous pursuant to 28 U.S.C. § 1915 and
25 the dismissal will count as a “strike” under 28 U.S.C. § 1915(g). ECF No. 9, p. 6.

1 Plaintiff has not responded to the Court's Order to Show Cause and has not filed an
2 amended complaint. Accordingly, it is recommended that this action be dismissed dismissal of
3 this action as frivolous pursuant to 28 U.S.C. § 1915 and that the dismissal should count as a
4 "strike" under 28 U.S.C. § 1915(g).

5 CONCLUSION

6 Although he was given leave to amend, Plaintiff failed to respond to this Court's order
7 and has failed to file an amended pleading stating a cognizable claim under 42 U.S.C. § 1983.
8 Accordingly, this case should be **dismissed without prejudice and the dismissal counted as a**
9 **"strike" under 28 U.S.C. § 1915(g).**

10 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
11 Procedure, the parties shall have fourteen (14) days from service of this Report to file written
12 objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
13 objections for purposes of appeal. *Thomas v Arn*, 474 U.S. 140 (1985). Accommodating the
14 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on
15 **September 30, 2011**, as noted in the caption.

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19 **DATED** this 12th day of September, 2011.

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22 Karen L. Strombom
23 United States Magistrate Judge
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